PROCEEDINGS AND ORDERS

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Aug 22 1984	Application for extension of time to file petition and order granting same until October 15, 1984 (Blackmun, August 27, 1984).
Oct 15 1984	Petition for writ of certiorari filed.
Oct 19 1984	Waiver of right of respondent United States to respond filed.
Oct 24 1984	DISTRIBUTED. November 9, 1984
Nov 13 1984	REDISTRIBUTED. November 21, 1984
Nov 26 1984	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan joins. (Detached opinion.)

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No. A-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARVIN ROTH
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

DOES THE OPINION OF THE COURT OF APPEALS CONFLICT WITH THE DECISIONS OF THIS COURT CONCERNING THE QUANTUM OF PROOF NECESSARY TO SHOW THE EXISTENCE OF A CONSPIRACY SO AS TO ADMIT ALLEGED CO-CONSPIRATOR HEARSAY STATEMENTS INTO EVIDENCE?

PARTIES

Petitioner, Marvin Roth, was one of two defendants charged in a four count indictment in the United States District Court for the Eastern District of Missouri, Eastern Division. Petitioner was charged with (1) two counts of use of extortionate means to collect or attempt to collect an extension of credit in violation of 18 U.S.C. §894 (Counts I and IV); (2) making an extortionate extension of credit in violation of 18 U.S.C. §892 (Count II) and (3) conspiracy to use extortionate means to collect an extension of credit in violation of 18 U.S.C. §894 (Count III). The other defendant, Michael Roth, was also charged with all of the above offenses. Petitioner and Michael Roth were tried together and both were found guilty of all counts.

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No. A-121

IN THE

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OCTOBER TERM, 1984

MARVIN ROTH
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Marvin Roth, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the judgment of the Court below entering judgment of conviction and sentencing petitioner to a total term of imprisonment of twenty years and a $20,000.00 fine.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is appended hereto as Appendix A. The Order denying petitioner's Petition for Rehearing is appended hereto as Appendix B. To petitioner's knowledge, neither the Opinion nor the Order have yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 12, 1984 affirming the trial court's judgment and sentence entered on July 15, 1983 after trial by a jury. The Court of Appeals denied a timely motion for rehearing on July 17, 1984. An extension of time to file this Petition was granted by Justice Blackmun on August 27, 1984. (Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and United States Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner raises claims with respect to his right to confrontation of the witnesses against him guaranteed by the Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be imformed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to 18 U.S.C. §3221 for alleged violations of 18 U.S.C. §892, §894.

This case concerns the purported effort of petitioner Marvin Roth and his co-defendant Michael Roth (who is unrelated to petitioner) to collect a loan from an individual named Jacques Farache. This loan was made to Farache by o Aaron Pultman who was a business partner of Michael Roth and a nephew of petitioner.

The loan, made in November, 1981, was for $30,000.00 with a term of one year. Interest was 13 percent per month for the first six months and 11 percent for the last six months (Tr. Vol. 1, p. 36). The loan was for the purpose of allowing another individual, Pfifer, to conduct a drug transaction (Tr. Vol. 2, pp. 38, 54). Farache kept $5,000.00 and delivered the othe $25,000.00 to Pfifer. (Tr. Vol. 1, p. 36).

In July 1982, Pultman was arrested for sale of cocaine and was indicted on federal drug charges on July 22, 1982 (Tr. Vol. 1, p. 165). Pultman died of a gunshot wound the following day.

On or about August 3, 1982, Farache received a telephone call from an unknown person concerning repayment of the Pultman loan. He was told that he would have thirty days to repay the loan, and that it would be collected one way or the other (Tr. Vol. 1, pp. 38-39). Farache thereupon contacted Detective Hegger of the St. Louis Police Department with whom he had worked in an informant capacity. (Tr. Vol. 1, p. 39).

About two weeks later, Farache received additional calls regarding the loan and it was agreed that Farache would pay off the loan at $3,000.00 per month.

Farache subsequently recorded other phone calls from the unknown "collector" and a line "trap" was placed on Farache's telephone to determine where the calls were originating. It was determined that the calls were coming from Michael Roth's restaurant (Tr. Vol. 2, pp. 175-176). Arrangements were made for the first payment at Barnes Hospital in St. Louis. On August 23, 1982, Farache went to Barnes Hospital where he handed over $3,000.00 to Robert Jackson. Petitioner was seen with Jackson at the pick-up site; however, petitioner was not observed to participate with Jackson in the pick-up. (Tr. Vol. 2, pp. 83, 97, 99-100).

One phone call to Farache was taped by him prior to the August 23 meeting and ten were taped between that date and

November 1, 1982. All of the conversations were introduced and received as evidence against petitioner over his hearsay objection. The line trap device indictated that all these calls originated from Michael Roth's restaurant. A pen register device was placed on the restaurant telephone line and this device corroborated that calls were made from it to Farache during this period (Tr. Vol. 2, pp. 220-221). Further verification of Michael Roth's placing of the calls to Farache was obtained by visual surveillance of the restaurant premises by an undercover officer (Tr. Vol. 2, pp. 84, 87).

On September 17, 1982, Michael Roth phoned Farache that a payment was expected that day at Barnes (Tr. Vol. 2, pp. 7-8). Farache showed up with $1,000.00 and again gave it to Jackson. Again, petitioner was seen accompanying Jackson (Tr. Vol. 2, pp. 177-178).

A third meeting was arranged for October 1, 1982 during a September 29 call from Michael Roth (Tr. 2, pp. 15, 222). Farache did not appear at the October 1 meeting, but FBI agents observed Jackson and petitioner at Barnes at the appointed time (Tr. Vol. 2, pp. 178-179). They were followed to Michael Roth's restaurant (Tr. Vol. 2, p. 88).

Jackson, testifying as a government witness as a result of a plea bargain, admitted that on October 5, 1982, he and one John Pluff, went to the nightclub where Farache played in a band. Both Jackson and Pluff threatened him if he did not repay the loan (Tr. Vol. 2, pp. 113-116). Jackson told petitioner of his actions the following day (Tr. Vol. 2, p. 116). This was the first overt threat made to Farache. However, as indicated, all recorded conversations which occurred prior to this date were received in evidence despite the fact that there was no evidence that petitioner participated in the conversations.

Another payment was scheduled for November 1, 1982 via a Michael Roth call to Farache that day. The payment was to be made at the St. Louis Airport (Tr. Vol. 2, pp. 28-29). Petitioner met Farache there and received $500.00 from him. He was arrested at that point by FBI agents (Tr. Vol. 2, pp. 233, 239).

REASONS FOR ALLOWING THE WRIT

The Decision Of The Court Of Appeals Upholding The Admission Of Co-Conspirator Hearsay Statements, In The Absence Of Sufficient Evidence To Show The Existence Of A Conspiracy When The Statements Were Made, Denied Petitioner His Sixth Amendment Right To Confront The Witnesses Against Him And Conflicts With Its Own Decisions, Those Of This Court And Of The Other Circuits Relative To The Quantum Of Proof Necessary To Admit Such Statements.

This case provides the Court with an excellent opportunity to resolve conflicts among the Circuit Courts of Appeals relative to the proper method of determining the admissibility of purported co-conspirator statements both as to the timing of the admissibility decision by the trial court and as to the quantum of proof necessary to satisfy the "existence of a conspiracy" requirement of Federal Rules of Evidence 801 (d)(2)(E). Additionally it allows the Court an opportunity to redress the deprivation of petitioner's Sixth Amendment right to confront the witnesses against him which occurred when the trial court allowed the admission of hearsay statements when the quantum of proof necessary to bring them within the co-conspirator's exception to the hearsay rule under Federal Rule of Evidence 801(d)(2)(E) was insufficient in the absence of the challenged statements themselves.

In *Glasser v. United States,* 315 U.S. 60 (1942), this court held that before a co-conspirator hearsay statement could be admitted into evidence against the non-declarant, the existence of the conspiracy and the non-declarant's participation in it must be established by competent evidence totally independent of the statements themselves. In other words, the hearsay cannot "lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States, supra,* 315 U.S. at 74-75.

In addition to the "existence - participation" requirement,to be admissible, co-conspirator hearsay statements must also be

made during the course of the conspiracy, *Dutton v. Evans,* 400 U.S. 74, 81 (1970); *Krulewitch v. United States,* 336 U.S. 440 (1949). Further, the statement must be "in furtherance of" the conspiracy. *United States v. Nixon,* 418 U.S. 683, 701 (1974); *Lutwak v. United States,* 344 U.S. 604, 617-18 (1953).

Since the effective date of the Federal Rules of Evidence, however, numerous conflicts have arisen among the circuits with respect to what evidence can be considered in making the factual determinations necessary to the admissibility question, what standard to apply to that evidence and when and how the challenged evidence should be offered and admitted.

It is generally acknowledged that the question of admissibility is a question for the trial court under Federal Rules of Evidence 104(b). However, a split of authority has developed as to how and when it should make this determination.

As the Opinion of the Eighth Circuit in the case at bar makes clear, courts in the Eighth Circuit are required to follow the procedure established by *United States v. Bell,* 573 F.2d 1044 (8th Cir. 1978), Slip Op. at 12. *Bell* dictates that the admissibility of the statements be determined by the trial court at the conclusion of all the evidence. The statements, however, may be conditionally admitted during the Government's case in chief. If the trial court finds that there is insufficient independent evidence to show the existence of the conspiracy and the defendant-non-declarant's participation in the conspiracy by a "preponderance of the evidence", then it is then required to declare a mistrial or, if possible, give a curative instruction to the jury and not admit the evidence. Other circuits require different procedures. The Fifth Circuit, for example, requires that the Government prove by a preponderance of the evidence at a pre-trial hearing that it has sufficient evidence, wholly independent of the statements themselves, to meet its admissiblity burden. *United States v. James,* 590 F.2d 575, 582 (5th Cir. en banc 1979).

The Tenth Circuit rule, on the other hand, established by *United States v. Andrews,* 585 F.2d 961 (10th Cir. 1978), re-

quires the trial court to refuse to allow the Government to even conditionally offer the statements until the end of its' case in chief, by which time the trial court has had an opportunity to hear all of the independent evidence relating to the existence of the conspiracy and the non-declarant's participation, as well as evidence pertaining to whether the statements were made in the course of, and in furtherance of, the conspiracy. *See also, United States v. Peterson,* 611 F.2d 1313 (10th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980); *United States v. Radecker,* 664 F.2d 242 (10th Cir. 1981). Even within the Eighth Circuit there is thoughtful questioning of the *Bell* procedure. *See United States v. Howard,* 706 F.2d 267 (8th Cir. 1983) (McMillian, J. concurring in judgment, suggesting use of a hybrid procedure based on the Fifth and Tenth Circuit rules.)

Another area of differing standards among the circuits is the burden of proof that the Government must carry to show the existence of the conspiracy as well as the "participation", "in furtherance of" and "in the course of" elements. Most circuits, including the Eighth Circuit, adhere to a "preponderance of the evidence" standard while the Fifth, Sixth and Ninth adhere to the lesser "prima facie standard". *See In Re Japanese Electric Products Antitrust Litigation,* 723 F.2d 238, 261-63 (3rd Cir. 1984) and *United States v. Santiago,* 528 F.2d 1128, 1132-33 (7th Cir. 1978), for excellent surveys of divergent standards of proof.

Petitioner submits that these conflicts among the circuits require this Court's attention since these are important and recurring problems in the lower courts that need a uniform rule of law.

Perhaps the most disquieting conflict between the circuits, however, one which petitioner respectfully submits urgently needs this court's attention and which requires reversal of this conviction, is the question of what quantum of proof is necessary to make the requisite showing of admissiblity under Rule 801(d)(2)(E) and the related question of what evidence is permissible to supply that showing.

As noted above, at least as early as 1942 in *Glasser v. United States, supra,* this Court held that the evidence necessary to admit co-conspirator hearsay statements must be entirely independent of the statements themselves. However, some courts, believing this restriction has been removed by Rules 104 and 801(d)(2)(E), Federal Rules of Evidence, have begun considering the challenged statements themselves in determining whether the Government has made an adequate showing of the required statements themselves. This trend has been most notable in the Sixth Circuit, *United States v. Luce,* 713 F.2d 1236, 1242 (6th Cir. 1983), *United States v. Hancock,* 703 F.2d 982, 983 (6th Cir. 1983), as well as in the First Circuit, *United States v. Guerro,* 693 F.2d 10, 12 (1st Cir. 1982) and the Ninth Circuit, *United States v. Brooklier,* 685 F. 2d 1208, 1219-20 (9th Cir. 1982).

Petitioner submits that, although the Eighth Circuit ostensibly follows the majority in requiring the Government to produce sufficient evidence of the elements of admissibility wholly independent of the statements, *United States v. Bell, supra,* the case at bar clearly shows at least a *sub silencio* approval of the use of the statements themselves in determining whether the Government has met its admissiblity burden. Further, by the minimal evidence cited by the appellate opinion in this case to support the trial court's admissiblity decision, the court appears to have abandoned its own preponderance of the evidence standard established by *Bell, supra,* for some lower, unconstitutional quantum of proof. CF. *United States v. Nelson,* 603 F.2d 42, 44 (8th Cir. 1979) (preponderance of independent evidence standard is followed in Eighth Circuit).

Petitioner's position, taken throughout this prosecution, has been that there was no independent proof of a conspiracy of which he was even arguably a member until after all the hearsay statements made by co-defendant Michael Roth and/or others unknown were made. In other words, there was no evidence other than the challenged hearsay statements that showed a con-

spiracy to use extortionate means to collect or attempt an extension of credit of which he was a part.

In its Opinion in this case, the Court of Appeals cited only three pieces of evidence that supported the admissibility of the hearsay statements which consisted of recorded and unrecorded telephone conversations of the co-defendant, Michael Roth, and possibly another unidentified person. This evidence was (1) the initial telephone call to the "victim", Farache, in which he was told the debt would be collected "one way or the other." (2) the fact that petitioner was present on two occasions when Farache paid part of the loan to Jackson and (3) petitioner's early awareness of the fact that Farache owed the money to petitioner's deceased nephew Aaron Pultman (Slip Op. at 13).

The identity of the initial caller to Farache was never established, although Farache testified that it was not the subsequent caller, Michael Roth. (Tr. II, 1-41, 84-87, 227, 312). The Government's theory, however, was that it was a co-conspirator of Michael's, possibly petitioner, who made the call. Of course, this is precisely one of the hearsay statements that was challenged. Thus, for the Court of Appeals and the trial court to rely upon it to show the existence of a conspiracy to collect a debt by extortion as of the earliest possible date, violates the "bootstrapping" rule of *Glasser* as well as the Eighth Circuit's own "wholly independent evidence" standard established by *United States v. Bell, supra,* and *United States v. Nelson, supra.* The use of this challenged statement to support the finding on the ultimate issue is contrary to every pronouncement of this Court since *Glasser* and contravenes the Sixth Amendment right to confrontation of witnesses.[1]

---

[1] It should be noted that even this statement, by itself, is extremely equivocal. Collection of a debt "one way or another" could as easily refer to legal action if voluntary payment was not made as to threats or actual violence to the person or property of the debtor.

The additional evidence cited by the Court of Appeals does not in and of itself prove that an unlawful conspiracy existed or that petitioner knowlingly participated in it at the time the challenged hearsay statements were made. The fact that (a) petitioner was present when the money was paid by Farache to Jackson and (b) that he knew Farache owed the money to Pultman does not prove the existence of an unlawful agreement. Indeed, there are numerous cases holding on similar facts that evidence such as this is insufficient to show the existence of a conspiracy participated in by the non-declarant. *See, e.g. United States v. Harshaw,* 705 F.2d 317, 322 (8th Cir. 1983) (mistrial properly declared at close of evidence since proof of conspiracy by independent evidence insufficient showed only defendant's presence or proximity to the illegal drug sales and hearsay "co-conspirator statements" should not have been conditionally admitted). *United States v. Stroupe,* 538 F.2d 1063, 1065-66 (4th Cir. 1976) (Defendant's presence near drug sales points is not enough independant evidence of existence of his participation in conspiracy to support admission of hearsay statements.) *See also, United States v. Gresko,* 632 F.2d 1128, 1130-32 (4th Cir. 1980).

For the foregoing reasons, Petitioner respectfully submits that this Court should issue its Writ of Certiorari to both correct the conflicts that exist between the Circuits regarding the admissibility of alleged co-conspirator hearsay statements and to correct the Eighth Circuit's erroneous declaration of the law in allowing the admission of the challenged statements in this case and reverse this conviction.

CONCLUSION

For all of the above reasons, petitioner respectfully submits that this Court's Writ of Certiorari should issue to review the decision of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1983

United States of America,
Appellee,

vs.

Michael Roth,
Appellant.

No. 83-1984

United States of America,
Appellee,

vs.

Marvin Roth,
Appellant.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: March 14, 1984
Filed: June 12, 1984

Before ROSS, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

ROSS, Circuit Judge.

Michael Roth and Marvin Roth, unrelated codefendants, were indicted by a grand jury for making an extortionate extension of credit, using extortionate means to collect or attempt to

collect an extension of credit, and conspiring to use extortionate means to collect or attempt to collect an extension of credit, in violation of 18 U.S.C. §§ 892, 894 (1976). The defendants were tried before a jury and found guilty on each count contained in the indictment. The district court[1] sentenced Michael Roth to fifteen years imprisonment on each count, with the sentences to run concurrently, and imposed a fine of $20,000. Marvin Roth was sentenced to twenty years imprisonment on each count, with the sentences to run concurrently, and was also fined $20,000. The defendants appeal their convictions alleging that several errors were committed by the district court. Appellants invoke this court's jurisdiction under 28 U.S.C. § 1291 (West Supp. 1983). For the reasons stated herein we affirm the convictions.

FACTS

Jacque Farache, borrowed $30,000 from Aaron Pultman in November 1981. The loan was for the term of one year with interest owing at thirteen percent per month for the first six months, and eleven percent for the last six months. Pultman was the nephew of Marvin Roth, and was Michael Roth's partner in a restaurant establishment known as Bagel & Brew, in St. Louis.

On July 6, 1982, Pultman was arrested in connection with a major drug transaction. Subsequently he was indicted by a grand jury for his involvement in the transaction. The day following the indictment he was found dead in an abandoned automobile. After Pultman's death, Marvin Roth viewed documents at Pultman's home and found evidence that Farache owed Pultman $30,000.[2]

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[1] The Honorable Kenneth H. Wangelin, United States District Judge for the Eastern District of Missouri.

[2] Unbeknownst to the Roths, Farache had repaid approximately $10,000 of the $30,000 debt at the time of Pultman's death.

On August 3, 1982, approximately 10 days after the discovery of Pultman's body, Farache received a telephone call concerning the repayment of his loan from Pultman. The caller stated that there was a debt of approximately $42,000 "on the books," consisting of $30,000 principal and $12,000 interest. Farache was told that he had 30 days to repay the debt which would be collected "one way or another."

Immediately after receiving this call, Farache contacted Detective Hegger of the St. Louis Police Department and advised him of what had transpired. Farache had been an informant for Detective Hegger since 1980 when he was arrested on drug charges.

Approximately two weeks later Farache received a second and third call to arrange a payment schedule. It was eventually agreed that payments of $3,000 per month would be made against the indebtedness. During these conversations Farache talked to the original caller and "his superior."

Farache again notified Detective Hegger of the calls. Hegger provided Farache with a tape recorder to record future telephone conversations, and had Southwestern Bell place a line identification device on Farache's phone to register the originating number of all incoming calls.

On August 23, 1982, Farache received a call originating from Michael Roth's restaurant. The caller instructed Farache to deliver the first $3,000 payment to a man named Frank at Barnes Hospital in St. Louis.

Equipped with a body recording device Farache went to Barnes Hospital to deliver the $3,000 payment. Officers of the St. Louis Police Department surveilled the meeting, and observed Farache hand the payment to a man later identified as Robert Jackson. Marvin Roth was observed driving away from the scene with Jackson.

Farache received additional calls regarding the loan during the early part of September. All of the calls originated from Michael Roth's restaurant. Police officers posing as customers corroborated the timing of these calls, and identified Michael Roth as the caller.

On September 17, Michael Roth phoned Farache and told him that a payment was expected that day at the "same place." Later that day Farache delivered $1,000 to Jackson, and explained that he could not raise the $3,000 that had been requested.

At this time special agents of the Federal Bureau of Investigation (FBI) applied for and received a court order authorizing the installation of a pen register device on the private telephone at the Bagel & Brew Restaurant. A pen register device records the date, time, and duration of outgoing telephone calls placed from the telephone to which it is attached. The pen register device on the Bagel & Brew telephone became operational on September 21 and continued in operation through November 2.

Michael Roth telephoned Farache again on September 29, to arrange for an October 1 payment. Farache did not have the money to make the payment, and, therefore, did not meet with Jackson as scheduled. Special agents of the FBI observed Marvin Roth and Jackson at the Barnes Hospital payment location, and followed them as they returned to Michael Roth's restaurant.

Michael Roth telephoned Farache to discern why he had not made the payment. Farache insisted that he should not have to continue to make payments since the money had been "lost" as a result of a previously successful police narcotics investigation. Michael Roth indicated to Farache that Aaron Pultman "felt the same way." Farache then asked for different payment terms, but Michael Roth said he was without authority to make those kinds of decisions. Marvin Roth subsequently rejected the idea of discharging the entire indebtedness for a reduced sum.

Officers in the restaurant observed the Roths and Jackson talking shortly after the telephone call. At that time Jackson volunteered to talk to Farache about the indebtedness. On October 5, Jackson and a friend, John Pluff, met with Farache. Several threats were made against Farache, and he was visibly shaken by this encounter.

Shortly after this incident Jackson was approached by the FBI and agreed to cooperate with the government. He made no further pickups for the Roths.

On November 1, Farache received another call from Michael Roth, and arrangements were made for a payment to be delivered at Lambert International Airport. That evening Farache delivered $500 to Marvin Roth, who was then arrested. Thereafter, Michael Roth was arrested.

ISSUES

On appeal both defendants claim that the district court erred in admitting Robert Jackson's testimony regarding his agreement with the government, and in allowing the government to use documents which had not been furnished to the defendants. Marvin Roth raises three additional allegations of error. He claims that the district court erred in denying his motion for severance, in admitting the telephone conversations of his codefendant, and in imposing an excessive sentence.

DISCUSSION

A. Admission of Coconspirator's Guilty Plea

At trial Robert Jackson testified extensively as to his participation with the Roths in the scheme to collect the loan. During the direct examination of Jackson the government sought to elicit testimony from Jackson regarding his agreement with the government. The following exchange took place:

Q. (By Mr. Dowd) Tell us whether or not the Government promised you that you would be charged with only one count of conspiracy to extort funds in this case?

MR. LONDON: May we approach the bench?

(The following occurred at the bench outside the hearing of the jury.)

MR. LONDON: I'm going to have to object, Your Honor. I'm going to object to this line of questioning. He has now injected into this case that the witness has agreed to plead guilty to conspiracy to extort money which is the very charge in this trial before this jury. And I move that it be stricken and the jury instructed to disregard it, and a mistrial be declared. How could this jury be asked to pass upon this with an open mind when the Government now is leading their own witness and bringing the ultimate issue?

THE COURT: Of course, he's the fellow that's making the contacts. I'm going to allow you to—let's avoid leading so much. He has already testified that he made an arrangement with the authorities; is that right?

MR. LONDON: He testified, not only that, it was an arrangement with respect to extortion.

THE COURT: You may ask him what that agreement was.

MR. DOWD: Okay.

(The following occurred within the hearing of the jury.)

Q. (By Mr. Dowd) Mr. Jackson, what was your agreement with the Government?

A. The agreement was that I not make any further pickups and that I would only be charged with one count of conspiracy.

Q. Okay.

A. And that the prosecutors would let the sentencing judge, make him aware of my cooperation.

The appellants contend that this testimony was highly prejudicial.

Ordinarily, one person's guilty plea or conviction may not be used as substantive evidence of the guilt of another. *See United States v. Wiesle,* 542 F.2d 61, 62 (8th Cir. 1976). However, evidence that a codefendant has pled guilty to the same offense is not error unless elicited as substantive proof of the defendant's guilt. Such evidence is clearly admissible to show the witness' acknowledgement of participation in the offense, or to reflect on his credibility. In such circumstances the jury should be instructed that the evidence is received for this purpose alone, and that they are not to infer the guilt of the defendant. *See Wallace v. Lockhart,* 701 F.2d 719, 725-26 (8th Cir.), *cert. denied,* 104 S.Ct. 340 (1983).

In this case no limiting instruction was given by the trial court, however, defense counsel did not request one, nor did they object to its absence. Furthermore, in light of the overwhelming evidence of guilt in this case, we believe the error, if any, to be harmless and no reversible error was committed. *See Gerberding v. United States,* 471 F.2d 55, 60 (8th Cir. 1973).

The appellants rely on *United States v. Fleetwood,* 528 F.2d 528 (5th Cir. 1976), wherein the court held that the government's emphasis on a witness's guilty plea was manifestly prejudicial. The court espoused the following guidelines for determining whether such evidence requires reversal:

> In evaluating the impact of a witness' guilty plea "we must carefully examine all the facts and circumstances of the case in their proper context. The presence or absence of [a limiting] instruction is an important factor, but it is also essential to consider other factors, such as whether there was a proper purpose in introducing the fact of the guilty

> plea, whether the plea was improperly emphasized or used as substantive evidence of guilt, whether the introduction of the plea was invited by the defense counsel, whether an objection was entered or an instruction requested, whether the defendant's failure to object could have been the result of tactical considerations, and whether, in light of all the evidence, the failure to give an instruction was harmless beyond a reasonable doubt".

Id. at 532 (citation omitted). Even under the analysis employed in *Fleetwood* the appellants are not entitled to the requested relief.

As discussed above, while an objection was made to the admission of Jackson's testimony regarding his agreement with the government, no request was made for a limiting instruction, nor was an objection made to the absence of one. Furthermore, unlike *Fleetwood,* the government in this case did not improperly emphasize the testimony, or attempt to use it as substantive evidence of guilt. Rather, it was the defense counsel that first used the term "guilty," and emphasized this testimony during the cross-examination:

> Q. [By Mr. London] Let me ask you, sir: Mr. Dowd asked you if you had entered into some sort of an agreement with the Government whereby you would be charged and *plead guilty* to something; is that right, sir? (Emphasis added.)
>
> A. That's correct.

Finally, the government explained at oral argument that it sought to disclose Jackson's cooperation and the agreement in order to diffuse any attempt by the defendants to show bias on cross-examination. We agree that this is a legitimate purpose. *Cf. United States v. Wiesle, supra,* 542 F.2d at 63 (defendant attempted to establish a deal between government and witness). Under the facts and circumstances presented in this case we hold that any error committed by the district court was harmless beyond a reasonable doubt. *See* FED. R. CRIM. P. 52(a).

B. Admission of Evidence Not Furnished to the Defense

On the last day of trial, Michael Roth testified on direct and cross-examinations that the only loan he had made to Aaron Pultman was for $25,000 in late January or early February of 1982.[3] On cross examination Michael Roth was confronted with a note dated January 3, 1983, which showed a $46,000 loan from Michael Roth to Pultman. He then testified that he found this note after Pultman's death, signed it, and took it to an attorney in Kansas City for the purpose of collecting the loan he had made to Pultman. He also testified that he found a note for $90,000 from Pultman to Marvin Roth, and that Marvin had subsequently signed the note and gone to Kansas City with him to see the attorney.

The appellants argue that the government should have disclosed these documents under Federal Rule of Criminal Procedure 16.[4] We reject the appellants' argument.

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[3] During the noon recess the FBI had delivered promissory notes signed by Pultman and the Roths to the United States Attorney. The FBI had obtained the notes earlier that day from an attorney in Kansas City, Missouri.

[4] In pertinent part the rule provides:

> **(C) Documents and Tangible Objects.** Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense *or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.*
>
> * * * *

This court has recognized that discovery matters are within the sound discretion of the district court, and are reviewable only upon a showing of an abuse of discretion. *See United States v. Vitale*, 728 F.2d 1090, 1093 (8th Cir. 1984). An error by the district court in administering the discovery rule is reversible error only if the error is shown to prejudice the substantial rights of the defendant. *Id.* In this case we cannot say that the trial court abused its discretion or that substantial rights of the defendants were prejudiced.

Rule 16 requires that the documents be "intended for use by the government as evidence in chief at the trial, or [be] obtained from or belong to the defendant." FED. R. CRIM. P. 16(a)(1)(C). Here the notes were used for impeachment purposes and were not offered in the government's case. Additionally, the notes were neither "obtained from," nor did they "belong to" the appellants, as required by Rule 16. Finally, the appellants were not substantially prejudiced by the use of the notes as each was aware of the existence of the notes prior to their use by the government. Accordingly, we hold that the district court did not abuse its discretion nor were any substantial rights of the defendants prejudiced.

C. Severance

Marvin Roth alleges that the district court erred in denying his motion for severance. He contends that he was prejudiced as a result of this ruling, because there was no evidence that he had placed any of the telephone calls to Farache that were admitted

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> **(c) Continuing Duty to Disclose.** If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

FED. R. CRIM. P. 16(a)(1)(C) & (c) (emphasis added).

against Michael Roth, and because his defense differed from his codefendant's.[5]

In *United States v. Brim*, 630 F.2d 1307 (8th Cir. 1980), *cert. denied*, 452 U.S. 966 (1981), in addressing a similar argument, we stated:

> In ruling on a motion for severance the district court weighs the inconvenience and expense of separate trials against the prejudice resulting from a joint trial of codefendants. The question whether there is prejudice warranting severance is addressed to the sound discretion of the trial court * * *.
>
> Brim is required to show prejudice. A mere showing that defendant would have a better chance of acquittal in a separate trial is not sufficient to require severance. * * * Indeed, *absent a showing of clear prejudice, joinder of defendants charged with conspiracy is preferred* where proof of the charges is based on the same evidence and acts.

Id. at 1310 (citations omitted, emphasis added).

It is true that the recordings were of telephone conversations between Farache and Michael Roth, and that Marvin Roth was not directly mentioned by name. However, the government's theory was that Marvin Roth was the unnamed person that Michael Roth referred to in the conversations as being "in charge." Furthermore, the telephone conversations were circumstantial evidence of the conspiracy.

The Roths were charged with a common conspiracy. The acts which form the bases for these charges were identical. Furthermore, it was Marvin Roth who recruited Jackson to make the

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[5] Michael Roth testified that he was "playing a role" with Farache because he was afraid of Farache and thought this was the safest manner by which to collect the debt. Marvin Roth did not testify.

pickups. Marvin Roth was present at each of the collection meetings, corroborating his involvement in the events planned during the telephone conversations. Michael and Marvin Roth participated together in the events that constituted the offense. On these facts, there is no indication that the district court abused its discretion in denying the motion to sever. *See United States v. Reeves,* 674 F.2d 739, 746 (8th Cir. 1982); *United States v. Boyd,* 610 F.2d 521 (8th Cir. 1979), *cert. denied,* 444 U.S. 1089 (1980); *United States v. Phillips,* 607 F.2d 808, 810-11 (8th Cir. 1979).

D. Admission of Coconspirator's Statements

Marvin Roth claims that no threat was made to Farache prior to October 5, when Jackson and Pluff went to speak to Farache at his place of employment. He contends that any conversations between Michael Roth and Farache prior to that date were hearsay, and not within the coconspirator exception to the hearsay rule. *See FED. R. EVID. 801(d)(2)(E). The appellant's theory is that until a threat was made there was no conspiracy to extort, and, therefore, the conversatons were not in furtherance of the conspiracy charged.*

In United States v. Bell, 573 F.2d 1040 (8th Cir. 1978), we stated:

> [A]n out-of-court statement is not hearsay and is admissible if on the independent evidence the district court is satisfied that it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the declarant and the defendant were parties.

Id. at 1044. *See* FED. R. EVID. 801(d)(2)(E).

The evidence shows that when Farache was telephoned on August 3, 1982, he was told that the debt would be collected "one way or another." We believe that the district court could reasonably construe this comment as a threat evincing the begin-

ning of the conspiracy. Furthermore, Marvin Roth's involvement in the attempt to collect the money "one way or another" was shown early on in the scheme by his presence at the payment location. Additionally, the evidence showed that the note was discovered by Michael and Marvin Roth together. We are persuaded by the totality of the evidence that the district court did not err in finding that the recorded conversations took place during the course of the conspiracy. Accordingly, we hold that the statements were properly admitted.

E. Excessive Sentence

Marvin Roth contends that his sentence is excessive punishment disproportionate to the crime charged. While an appellate court has authority to review the severity of a sentence, a sentence within the statutory limits is generally not disturbed. *See United States v. Bangert,* 645 F.2d 1297, 1306 (8th Cir.), *cert. denied,* 454 U.S. 860 (1981); *United States v. Moss,* 591 F.2d 428, 438 (8th Cir. 1979). In this case the sentence given was within the statutory maximum. This court will not "substitute its judgment for the discretion committed solely to the district court." *United States v. Hollis,* 718 F.2d 277, 279 (8th Cir. 1983), *cert. denied,* 104 S.Ct. 1309 (1984). The district court did not abuse its discretion in this case.

CONCLUSION

We have examined the appellants' remaining arguments and find them to be without merit. Accordingly, we affirm their convictions.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-1983/1984-EM.

September Term, 1983

United States of America,
Appellee,

v.

Michael Roth,
Marvin Roth,
Appellants.

Appeals from the United States
District Court for the
Eastern District of Missouri

The Court, having considered appellants' petitions for rehearing or, in the alternative, suggestions for rehearing en banc and being now fully advised in the premises, are denied.

July 17, 1984

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-121

Marvin Roth,
Petitioner,

v.

United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 1984.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of August, 1984

SUPREME COURT OF THE UNITED STATES

ALVIN MEANS *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARVIN ROTH *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 83–6866 AND 84–605. Decided November 26, 1984

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

These cases raise three recurring issues regarding the administration of the co-conspirator exception to the hearsay rule.[1] Federal Rule of Evidence 801(d)(2)(E) provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy," when offered against that party, is not hearsay. The rule has given rise to confusion among the lower courts with regard to when, by what standard of proof, and in light of what evidence the trial court should determine whether the necessary conspiracy existed.

In No. 83–6866, a critical prosecution witness testified to incriminating statements made to him by petitioner's co-conspirator. The Sixth Circuit held that these statements were properly introduced pursuant to Rule 801(d)(2)(E). It concluded that the independent evidence, "when viewed in con-

[1] The petitions do not raise a fourth issue that has split the Courts of Appeals, *viz.*, whether a co-conspirator's statement that is admissible under the Federal Rules automatically satisfies the requirements of the Confrontation Clause of the Constitution. See *Sanson* v. *United States*, —— U. S. —— (1984) (WHITE, J., dissenting from denial of certiorari); see generally *United States* v. *Ammar*, 714 F. 2d 238, 254–257 (CA3), cert. denied, —— U. S. —— (1983).

junction with the [hearsay] statements by Blotske concerning [petitioner's] participation," established the existence of a conspiracy by a preponderance of the evidence. Pet. for Cert. 9. Thus, the Court of Appeals relied on the challenged statements to support the existence of the conspiracy pursuant to which those statements were introduced.

This approach was first adopted by the Sixth Circuit in *United States* v. *Vinson*, 606 F. 2d 149, 153 (1979), cert. denied, 444 U. S. 1074 and 445 U. S. 904 (1980), and has been approved en banc, *United States* v. *Piccolo*, 723 F. 2d 1234, 1240 and n. 1 (1983) (en banc), cert. denied, —— U. S. —— (1984). Though not entirely without support,[2] it is inconsistent with the stated position of every other Federal Court of Appeals. See *United States* v. *Jackson*, 627 F. 2d 1198, 1214–1215 (CADC 1980); *United States* v. *Nardi*, 633 F. 2d 972, 974 (CA1 1980); *United States* v. *Alvarez-Porras*, 643 F. 2d 54, 56–57 (CA2), cert. denied, 454 U. S. 839 (1981); *Government of the Virgin Islands* v. *Dowling*, 633 F. 2d 660, 665 (CA3), cert. denied, 449 U. S. 960 (1980); *United States* v. *Gresko*, 632 F. 2d 1128, 1131–1132 (CA4 1980); *United States* v. *James*, 590 F. 2d 575, 580–581 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979); *United States* v. *Regilio*, 669 F. 2d 1169, 1174 (CA7 1981), cert. denied, 457 U. S. 1133 (1982); *United States* v. *Bell*, 573 F. 2d 1040, 1043–1044 (CA8 1978); *United States* v. *Miranda-Uriarte*, 649 F. 2d 1345, 1349 (CA9 1981); *United States* v. *Andrews*, 585 F. 2d 961, 964–967 (CA10 1978); *United States* v. *Monaco*, 702 F. 2d 860, 876–880 (CA11 1983). I have noted this conflict before, see *Arnott* v. *United States*, —— U. S. —— (1983) (WHITE, J., dissenting from denial of certiorari), and remain convinced that this Court should resolve it.

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[2] See *United States* v. *Martorano*, 561 F. 2d 406, 408 (CA1 1977), cert. denied, 435 U. S. 922 (1978); *United States* v. *Cryan*, 490 F. Supp. 1234, 1241 (NJ), aff'd, 636 F. 2d 1211 (CA3 1980); J. Weinstein and M. Berger, Weinstein's Evidence ¶ 104[05], p. 104–44 (1982).

Whether the Eighth Circuit belongs in the above list is in some doubt in light of the second of these petitions. The petitioner in No. 84–605 was convicted of extortion. The critical evidence was testimony by the victim about threatening phone calls he received from petitioner's co-conspirator. The District Court first admitted the statements conditionally, then, after the close of evidence, ruled that they were admissible. The Court of Appeals found that the statements were properly admitted. The court stated that the existence of a conspiracy must be established by independent evidence. Yet it relied on one of the threatening phone calls, this one from an uncertain source, to establish the date that the conspiracy had begun. App. to Pet. for Cert. A–12. Petitioner argues, with some force, that this use of the hearsay statement is inconsistent with the prevailing requirement of independent evidence.

The petitioner also raises two other issues as to which there is some division among the lower courts. First, he objects to the timing of the ruling on admissibility, arguing that admissibility should be established at a pretrial hearing rather than at the close of evidence Second, he notes the existence of a conflict as to the standard of proof by which the conspiracy must be established. The majority position requires a preponderance of the evidence. See *United States* v. *Ammar*, 714 F. 2d 238, 249–251 (CA3), cert. denied, —— U. S. —— (1983); *United States* v. *Petersen*, 611 F. 2d 1313, 1327 (CA10 1979), cert. denied, 447 U. S. 905 (1980); *United States* v. *Jefferson*, 714 F. 2d 689, 696 (CA7 1983); *United States* v. *Bell*, *supra*, at 1044; *United States* v. *Arnott*, 704 F. 2d 322, 325 (CA6 1982), cert. denied, —— U. S. —— (1983). Other courts require only substantial evidence, *United States* v. *Jackson*, *supra*, at 1219–1220; *United States* v. *James*, *supra*, at 580–581; *United States* v. *Monaco*, *supra*, at 876–880; or a prima facie case, *United States* v. *Dixon*, 562 F. 2d 1138, 1141 (CA9), cert. denied, 435 U. S. 927 (1977);

United States v. *Metz*, 608 F. 2d 147, 153–154 (CA5 1979), cert. denied, 449 U. S. 821 (1980).

The timing issue does not merit our review.[3] The question of the standard of proof does, but neither of these cases would be an appropriate vehicle as in each the Court of Appeals applied the most stringent alternative.[4] These cases are nonetheless reminders of the continuing confusion about the administration of the coconspirator exception—a confusion that, I think, we will eventually have to settle.

The critical question is whether a court may rely on challenged hearsay statements to determine whether the factual predicate for their admission exists. This Court has consistently denied certiorari in cases from the Sixth Circuit raising this issue. *Vinson* v. *United States*, 444 U. S. 1074 (1980); *Arnott* v. *United States*, —— U. S. —— (1983); *Shoun* v. *United States*, —— U. S. —— (1984); *Piccolo* v. *United States*, —— U. S. —— (1984). The conflict shows no sign of disappearing, and I remain convinced that this Court should resolve it.

I dissent from the Court's denial of certiorari in these two cases.

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[3] Though some courts have indicated a preference for pretrial hearings, see, *e. g.*, *United States* v. *James*, 590 F. 2d 575, 581–582 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979), none has required them. There is general agreement that the district court has the discretion to admit coconspirator's statements conditionally prior to proof of the existence of a conspiracy. See Annot., 44 A. L. R. Fed. 627, § 7 (1979).

[4] But see J. Weinstein and M. Berger, *supra*, at 104–44 (suggesting standard of proof beyond a reasonable doubt, or by clear and convincing evidence, on the basis of both hearsay and nonhearsay).